No. 80-853

IN THE

Supreme Court of the United States

October Term, 1980

PENTHOUSE INTERNATIONAL, LTD., *et al.*,

Appellants,

vs.

RANCHO LA COSTA, INC., *et al.*,

Appellees.

On Appeal from the Court of Appeal of the State of California.

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM.

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BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM.

A portion of the record that was available to the Court of Appeal in this proceeding has now been furnished to this Court.[1] A review of that record will readily establish that appellees' motions to dismiss or affirm are replete with factual and legal inaccuracies and are without merit.[2]

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[1]This Court has *not* been furnished with any of appellants' *evidence* in support of the public figure determination. That evidence remains in the custody of the Los Angeles Superior Court. (See appellants' Jurisdictional Statement [J.S.], at 13, n. 10.) This court *has* been furnished with the pleadings and briefs filed in connection with appellees' original proceeding (2d Civil No. 58487) before the Court of Appeal, as well as the record in a prior original proceeding (2d Civil No. 57880) which was incorporated by reference in appellees' Petition in the later proceeding. (See appellees' Petition for Writ of Mandate, filed on or about February 4, 1980, at pp. 2,7.)

[2]Appellees' "Statement of the Case" not only misstates the procedural history of the libel action before the Superior Court, but also contains numerous unsubstantiated and gratuitous slurs directed at appellants' magazine and at appellants' attorneys. Appellants will not waste this Court's time with a response to such unbecoming and irrelevant invective.

I.

APPELLEES' MOTION TO DISMISS IS ENTIRELY WITHOUT MERIT.

A. The Judgment of the Court of Appeal Is a "Final Judgment" Within the Terms of 28 U.S.C. §1257.

Under California law, a petition for a peremptory writ addressed to an appellate court commences an original and distinct legal proceeding. See California Constitution, Article VI, Section 10. Accordingly, this Court has recognized on numerous occasions that the judgment finally disposing of such an original proceeding in California is a "final judgment" within the meaning of 28 U.S.C. §1257. *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 14 (1931). See also, *Madruga v. Superior Court*, 346 U.S. 556, 557 (1954). Even though the effect of the Court of Appeal's judgment is to permit further proceedings in appellees' libel action, that judgment is nonetheless final for purposes of review by this Court. *Rescue Army v. Municipal Court*, 331 U.S. 549, 565 (1947).

B. The Appealable Issues Set Forth in Appellants' Jurisdictional Statement Are Properly Before This Court.

1. As the Court of Appeal Explicitly Found a State Statute To Be "Paramount" To the First Amendment, No Further Inquiry Need Be Made Into the Manner in Which the Issue Was Raised Below.

This Court has repeatedly declared that it is not necessary to consider how a federal question was raised below if the highest state court has made an explicit ruling on the issue. See *e.g., Jenkins v. Georgia*, 418 U.S. 153, 157 (1974).

In the instant proceeding, the Court of Appeal explicitly held that appellees' rights of privacy under the California

Constitution are "paramount" to appellants' First Amendment rights. The Court of Appeal emphasized that:

> "Under the mandate of the recent federal Supreme Court rulings, the right of privacy [in the California constitution] is paramount to the right of free speech when in the exercise of free speech a defendant violates another's privacy by uttering a defamatory lie about him. The right of free speech guaranteed by the state and federal Constitutions does not permit violation of the right of privacy. (B-26)[3]

Appellees attempt to avoid the impact of this astonishing holding by suggesting that the above-quoted statement by the court of Appeal pertained only to the court's interpretation of a California statutory privilege (Section 47(3) of the California Civil Code), not to appellants' federal "public figure" privilege. This suggestion, however, is belied by a careful reading of the opinion of the Court of Appeal.

First, the Court of Appeal itself purported to derive the above-quoted statement from the "mandate of the recent *federal* Supreme Court rulings." Appellants are aware of no recent rulings by this Court which have dealt with the interpretation of Section 47(3) of the California Civil Code. On the contrary, the Court of Appeal was obviously referring to this Court's "public figure" decisions and its understanding of those decisions.

Furthermore, in its concluding instructions to the trial court, the Court of Appeal emphasized that in order for appellants to "prove" the "fact" that appellees are public figures, appellants must convince a *jury* that appellees "willingly . . . relinquished their rights of *privacy*." (B-28)[4]

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[3]Page reference is to Appendix B of appellants' Jurisdictional Statement.

[4]See discussion at page 18-21 of appellants' Jurisdictional Statement.

It is also clear that appellants' First Amendment protections were in fact, undercut by the Court of appeal. For the first time in the history of American jurisprudence, an appellate court held *inter alia* that:

(1) A media defendant is required to offer evidence of the *truth* of an alleged libel as a *pre-condition* to obtaining a determination of the plaintiffs' status as public figures (JS, at 11-14);

(2) The determination of such public figure status—even when based upon uncontroverted evidence[5]—is a question of "fact" to be decided by the *jury* at the time of trial, rather than a question of law to be resolved by the court in advance of trial (JS, at 15-17);[6] and

(3) Appellants' First Amendment privilege, if established at trial, can be defeated by proof of common-law type malice. (JS, at 20)[7]

Appellants respectfully suggest that if any doubt remains as to whether these extraordinary holdings were grounded in the purported "supremacy" of California's privacy provision, this Court should vacate the decision of the Court of Appeal and remand the matter for clarification of the

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[5]There were no material facts in dispute on this issue. No evidence whatsoever was submitted by appellees to the trial court in opposition to appellants' motion for partial summary judgment. The "extremely voluminous" evidence (B-19) amassed by appellants—which the Court of Appeal refused to even look at—stood totally unchallenged before the trial court.

[6]Appellees openly acknowledge that the Court of Appeal so ruled. Moreover, appellees cite no case authority whatsoever for their contention that this ruling is "neither novel nor unconstitutional." (Appellees' Motion, at p. 17, n. 5) Instead, passing reference is made by appellees to an inapposite annotation published in 1923—more than forty years before this Court's decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

[7]Appellees attempt to argue that this clearly erroneous holding is to no effect because the issue was "never before the Court [of Appeal]." Under California law, however, such instructions issued to a trial court by an appellate court are binding upon the former. See *Overstreet v. County of Butte*, 57 Cal. 2d 504, 507 (1962).

state court's *ratio decidendi*. See, *e.g.*, *State Tax Commission of Arizona v. Murray Co.*, 364 U.S.. 289 (1960).[8] Alternatively, these extraordinary holdings (whether or not grounded in the supremacy of the state constitution) are sufficiently substantial in their own right to warrant review by this Court by way of certiorari. See 28 U.S.C. §2103.

2. Appellants Properly Challenged the Court of Appeal's Unconstitutional Interpretation of Section 47(3) of the California Civil Code.

The record before this Court clearly demonstrates that appellants challenged the constitutionality of the Court of Appeal's interpretation of Section 47(3) of the California Civil Code at appellants' earliest opportunity. JS, at 22-23.[9]

Appellees argue that the Court of Appeal's judgment did not discriminate in favor of "local" publications at the expense of "national" publications, but instead discriminated in favor of limited circulation publications at the expense of "general circulation" publications.[10] The latter distinction, of course, is neither more rational nor more constitutional than that identified by appellants.

II.

SUMMARY AFFIRMANCE OF THE JUDGMENT BELOW IS UNTHINKABLE.

A. Summary Reversal Would Be Far More Appropriate.

It is inconceivable that this Court would even consider summarily affixing its imprimatur to the unprecedented and unconstitutional holdings of the Court of Appeal.

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[8]*Cf.*, *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940): "[I]t is . . . important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the Federal Constitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases."

[9]See also, appellants' Petition for Rehearing, filed on June 23, 1980, at p. 20; Petition of Real Parties in Interest for Hearing (before the California Supreme Court), filed on July 16, 1980, at p. 9, n.4.

[10]Appellees' Motion, at pp. 6-7

As pointed out in appellants' Jurisdictional Statement, the clearest holding of the Court of Appeal may well be the most outrageous set forth in its judgment: That a media defendant can be required to offer evidence of the *truth* of an alleged libel as a *pre-condition* to obtaining a determination of the plaintiffs' status as *public figures*.

Appellees falsely suggest that the Court of Appeal concluded that appellants "had failed to prove that appellees had thrust themselves into controversy." It was *impossible* for the Court of Appeal to reach such a conclusion, because the Court of Appeal refused to review any of appellants' *evidence* on this issue. (B-20; JS, at 11-14)

On the contrary, the judgment of the Court of Appeal directed the trial court to *vacate* its public figure finding, not to *reverse* that finding. And the appellate court made it absolutely clear that the basis of its direction was appellants' conceded failure to offer any evidence intended to prove that the appellees are *in fact* "mobsters" and "associates of mobsters." The Court of Appeal unequivocally stated:

> "It is clear to us that the evidence [supporting the public figure determination] is legally insufficient . . . [O]n the specific question of the status or character of the plaintiffs as 'mobsters', 'gangsters', 'crooks', and 'associates' of crooks, mobsters, etc., the 'evidentiary' material is 99 and 44/100's% pure hearsay. . . . . There is no primary non-hearsay evidence of criminality of the remaining corporate or individual plaintiffs." (B-20)

Thus the Court of Appeal flatly rejected appellants' contention that the *truth* of the alleged libel was completely *irrelevant* to the public figure determination. This holding is at odds with every defamation decision issued by this Court since *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Indeed, as this is perhaps the central holding of the

Court of Appeal, the judgment issued by that court should properly be subject to summary *reversal* by this Court.

Even before *this* Court, appellees continue to argue that appellants have yet to present any "proof of the charges" against appellees. This argument is both untrue and, more importantly, irrelevant. The *truth* of the charges directed at appellees for more than fifteen years has no bearing upon the question of whether appellees are public figures.

Rather, it is the fact that such charges have been made at all and repeated in countless public statements[11] that is central to the determination of public figure status. Moreover, appellees' meek and sporadic denials of such charges (see, *e.g.*, JS at F-3, 6-8, 10-12) further encouraged appellants (and other publishers) to *believe* that the charges were true and, in any event, to conclude that appellees' unsavory reputations were in the public domain and were subject to fair comment under the First Amendment.

B. Appellees Must Clearly Be Deemed Public Figures Under the First Amendment.

The issue *never reached* by the Court of Appeal—and the issue which this Court should now address—is the extent to which the First Amendment protects the reporting of the voluntary activities of reputed organized crime figures.

Phrased another way, the question is: *Does the press have a qualified privilege to inform the public in a nonmalicious manner about the voluntary and controversial activities of individuals previously identified by law enforcement (and other) authorities as connected to organized crime*?

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[11]The Court will remember that the public statements set forth in Appendix F to appellants' Jurisdictional Statement represent only the "tip of the iceberg."

To suggest, as appellees have done, that they have never "thrust themselves into controversy" is to rewrite history. Appellees have played central roles in:

(a) a major political controversy concerning their contributions to a mayoral campaign (JS, at F-10-13);

(b) a controvery concerning their hosting of a prestigious professional golf tournament at which the spectators and participants mingled with reputed mobsters (F-8-9);

(c) a controversy about their continued and substantial borrowings from a Teamsters' pension fund which has been under government investigation for more than two decades because of its alleged ties to organized crime (F-1-10, 13-17, 19-20); and

(d) a controversy about their hosting the Frank Fitzsimmons Golf Tournament and its notorious invitees (F-19-20).

All of these controversies have, in turn, occurred against the backdrop of the larger controversy concerning La Costa itself and its disputed reputation as a meeting place for organized crime figures (F-3-5, 8-9, 12-13, 15-20).

In the final analysis, of course, a public figure is whatever this Court defines it to be. But that definition has thus far been developed in only a handful of cases; and in most of those cases this Court has concentrated on explaining who is *not* a public figure rather than who *is* a public figure.

Moreover, in none of those cases has this Court ever suggested (1) how the reputational interests of a *corporation* are to be balanced against the First Amendment's interest in a free press;[12] or (2) how the "broad rules of general

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[12]Nor has this Court ever pointed to any facts which might tend to indicate whether a corporate plaintiff in a defamation action had "voluntarily relinquished its right to privacy" so as to become a public figure. See Jurisdiction Statement at 21. *Cf., Ion Equipment Corp. v. Nelson*, 110 Cal. App. 3d 868, 878 (1980): "It is generally agreed that the right to privacy is one pertaining only to individuals, and that a corporation cannot claim it as such . . . . This is because the tort is of a personal character 'concern[ing] one's feelings and one's own peace of mind.' " [citations omitted]

application'' laid down in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) might be applied to the voluntary but clandestine activities of those associated with organized crime.[13]

At the same time, the task of exposing such clandestine activities is of critical importance to the maintenance of our system of ordered liberties.[14] President Johnson's Commission on Law Enforcement and Administration of Justice (which included Mr. Justice Powell) suggested that the press has not only a right but a *duty* to publish information concerning organized crime. Commission Report (''The Challenge of Crime in a Free Society''), at 484.

But while the press may well have a constitutional responsibility to assist law enforcement in the fight against organized crime, the press has neither the resources nor the capability to prove actual criminality in a court of law.[15]

Only the actual malice standard enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), can provide

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[13]The attempt to apply those ''broad rules'' to the distinctive circumstances of a defamation suit brought by a reputed organized crime figure led one trial court to declare: ''Defining public figures is much like trying to nail a jellyfish to the wall.'' *Rosanova v. Playboy Enterprises, Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976).

[14]Congress had declared: ''[O]rganized crime in the United States is a highly sophisticated, diversified and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; . . . . organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden and interfere with interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens . . . .'' (Public Law 91-452; 84 Stat. 922)

[15]For example, the press cannot offer the services of a Witness Protection Program to protect potential witnesses; the press is rarely privy to the confidential information upon which law enforcement authorities base their identification of organized crime figures; and the press is frequently blocked in its attempt to secure testimony from material witnesses by such impenetrable barriers as the Fifth Amendment privilege against self-incrimination—which has been invoked repeatedly by appellees' reputed associates in the action below.

the press with that "measure of strategic protection" which is necessary to operate effectively in this area of vital concern. The Constitution must permit—and, indeed, *encourage*—nonmalicious reporting concerning the voluntary and controversial activities of reputed organized crime figures.

Since this Court first provided constitutional protection for nonmalicious reporting about a college athletic director and a retired army general, no other subjects have been deemed by this Court worthy of that same protection. As a result, the public perception grows that this Court has effectively abandoned the privilege which it first established fourteen years ago. The time has come to correct that perception and to reaffirm First Amendment liberties in an area where the public's need for "a vigorous and uninhibited press" is both undeniable and urgent.

Conclusion.

For the foregoing reasons, the motions to dismiss or affirm should be denied and this Court should note probable jurisdiction of this appeal.

DATED: February 16, 1981.

Respectfully submitted,

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